



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 17, 2004

Mr. Leonard V. Schneider
Ross, Banks, May, Cron & Cavin, P.C.
2 Riverway, Suite 700
Houston, Texas 77056

OR2004-6995

Dear Mr. Schneider:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 208716.

The City of Mont Belvieu (the "city"), which you represent, received a request for a "[c]opy of payroll records E.P. [and] contract labor checks all from Nov 1- to date- contract with SSMi from beginning." You state that the requestor modified his request and that he now seeks a copy of the payroll records of Strong Sports Management, Inc. ("SSMI") from the date of SSMI's contract with the city to date as well as a copy of the contract labor checks from SSMI for the same time period. You first argue that because the city does not have possession or control of the requested information, the city is not required to respond to the request. You next argue that, if we determine that the city is required to respond to the request, portions of the requested information are excepted from disclosure under sections 552.101 and 552.136 of the Government Code. We have considered your claims and reviewed the submitted information.¹

You argue that the requested information is not subject to required public disclosure because you state that the requested information is maintained by SSMI and not the city. You state

¹You have submitted to this office 26 documents which you say are a representative sample of the payroll records the city received from SSMI. We assume that the "representative sample" of records submitted to this office is truly representative of the requested payroll records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

that “[t]he City currently does not have possession or control of these records as the pending litigation concerning the [required public disclosure of] the type [of] records requested by [the requestor] is not complete or final.”

The litigation you reference is the case of *Baytown Sun v. City of Mont Belvieu*, No. 14-03-00625-CV, 2004 WL 1193959 (Tex. App.—Houston [14 Dist.] June 1, 2004, no pet. h.). In that case, the court determined that, because the city is entitled to inspect the books and records of the Eagle Pointe Recreation Complex, it has a right to access SSMI’s relevant payroll account records and, consequently, SSMI’s employee salary information constitutes “public information” that is subject to public disclosure under the Public Information Act (the “Act”). See *Baytown Sun v. City of Mont Belvieu*, No. 14-03-00625-CV, slip op. at *2, 2004 WL 1193959 (Tex. App.—Houston [14 Dist.] June 1, 2004, no pet. h.); see also Gov’t Code § 552.002(a) (defining “public information” as “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body and the governmental body owns the information or has a right of access to it.”). You inform us that the city has filed a motion for rehearing in this case. In that motion, which we have reviewed, the city does not challenge the court’s determination that SSMI’s payroll account records are subject to required public disclosure as the city’s public information under the Act. Rather, in that motion, the city presents one issue for the court: whether the court erred in its finding in footnote 1 that the facts supplied by the city to the attorney general were “incomplete” and “inaccurate.” Furthermore, the city states in the motion that the alleged omitted facts are irrelevant to the court’s finding that the city had a right of access to the detailed salary information. Thus, the city asks the court to withdraw its opinion and substitute a new opinion not with a different finding on the question of whether SSMI’s information is subject to the Act, but only with a reformed footnote 1. Nevertheless, you contend that because the court’s order is not final, the request here is “premature” and “cannot be responded to by the City.”

The question of whether the requested SSMI payroll records and checks are subject to required public disclosure under the Act is not pending before a court at this time. The city has not disputed the court’s determination on that question to the court in its motion for rehearing or in this request for an open records ruling. As you state, “[t]he issue of whether . . . records of employees of Strong Sports or contract employees of Strong Sport that work at the Complex are public records has been determined by the 14th Court of Appeals.” We will therefore follow that court’s determination and find that the SSMI’s payroll records are subject to the Act and must be released by the city unless we determine that an exception to disclosure applies. Moreover, we find that the court’s reasoning in the *Baytown Sun* case likewise applies to the question of the city’s access to SSMI’s checks. Thus, we further find that the requested checks constitute information to which the city has a right of access under contract and which is therefore subject to public disclosure under the Act.

Having determined that the requested information is subject to the Act, we next address a procedural matter. Although you have submitted to this office a representative sample of the requested payroll records, you have failed to submit to this office copies or representative samples of the requested checks.

Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request, among other things, a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. *See id.* § 552.302. Because you have not submitted the information, we cannot determine the applicability of any exception to the required disclosure of the information. Thus, under section 552.302, we have no choice but to order the release of the requested checks. *See id.* If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

We turn to the exceptions you raise and the submitted representative sample of payroll records. You raise section 552.101 and the common-law right to privacy. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has determined that personal financial information not relating to the financial transaction between an individual and a governmental body is private and excepted from disclosure under section 552.101. *See* Open Records Decision Nos. 600 (1992), 545 (1990).

After review of the information you highlighted, we find that portions of the information are private and protected from disclosure under section 552.101 in conjunction with the common-law right to privacy. However, the right to privacy does not protect from disclosure financial information that does not appear to pertain to an identifiable individual. We have marked the information to indicate the kind of information that is private and that the city must withhold from disclosure based on section 552.101.

You assert that section 552.136 of the Government Code excepts from disclosure bank account numbers. Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. The city must, therefore, withhold the bank account numbers under section 552.136. We have marked the submitted documents accordingly.

In summary, because the city did not submit to this office the requested checks as required under section 552.301 of the Act, we cannot determine the applicability of any exception to the required public disclosure of this information and find that this information must be released in accordance with section 552.302. With the exception of the information subject to sections 552.101 and 552.136, the city must release the payroll records.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kay Hastings
Assistant Attorney General
Open Records Division

KH/seg

Ref: ID# 208716

Enc: Submitted documents

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